BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARCI C. MARTIN	)	
Claimant	)	
VS.	)	
	)	
ROYAL VALLEY PUBLIC SCHOOLS USD 337	)	Docket No. 1,060,837
Respondent	)	
AND	)	
	)	
HARTFORD INS. CO. OF THE MIDWEST	)	
Insurance Carrier	)	

ORDER

Claimant requested review of Administrative Law Judge Rebecca Sanders' Award dated March 20, 2013. The Board heard oral argument on June 11, 2013. Richard Billings, of Topeka, Kansas, appeared for claimant. Patricia Wohlford, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

Judge Sanders awarded claimant a 14% functional impairment to the foot based on the rating of Dr. Michael McCoy, M.D., the authorized treating physician.

The Board has considered the record and adopted the Award's stipulations.

ISSUES

Claimant requests the Board find that Dr. Zimmerman's conclusions more accurately reflect the nature and extent of her disability and award her a 29% impairment to the left lower extremity at the level of the ankle. While claimant asserted in her brief that her average weekly wage was $340 as she was hired to work a forty hour week at $8.50 per hour, she acknowledged at oral argument that she was a part-time employee. Claimant also asserted she entered into a new contract of employment when the 2010 school year ended, such that the Board should only determine her average weekly wage based on her earnings she generated from May 25, 2010 forward.

Respondent maintains Judge Sanders' Award should be affirmed.

The issues for review are: (1) what is claimant's average weekly wage; and (2) what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant normally performed after school care between 15 and 20 hours for respondent during the school year. During the summer of 2010, she generally worked 40 hours every other week as a group leader, unless she was filling in for a coworker, then she might work two weeks in a row or part of a second week. While the school year and summertime programs were different as to when they occurred, both involved claimant supervising children and making sure the children were safe, for the same employer at the same rate of pay, $8.50 per hour.

On July 2, 2010, claimant took children to a swimming pool as part of her duties. She jumped in the shallow end of the pool and fractured her left heel.

Michael T. McCoy, M.D., a board certified orthopedic surgeon, examined claimant on July 6, 2010. Dr. McCoy diagnosed her with a fracture of the os calcis (heel bone) and ordered a CT scan which showed a minimally displaced fracture. Claimant was placed in a padded short leg non-weight bearing cast for approximately a month and then advised to slowly increase weight bearing as tolerated. By August 25, 2010, claimant was ambulating well and had full range of motion of the ankle.

Over the next several months, claimant complained of discomfort and pain about the subtalar joint. On November 10, 2010, Dr. McCoy noted "[s]urprisingly, she has almost full subtalar motion but with pain." He recommended a repeat CT scan to check the present status of the subtalar joint. The CT study did not show any degenerative changes of the facet joints. Dr. McCoy believed claimant needed more time to heal.

Claimant continued to complain of persistent pain in the subtalar joint. On May 11, 2011, Dr. McCoy noted she had full range of motion of the ankle, but felt she had traumatic arthritis of the subtalar joint. Dr. McCoy recommended surgery and performed a subtalar fusion on June 24, 2011. Following surgery, claimant's symptoms improved.

On December 14, 2011, Dr. McCoy noted claimant was walking with no limp and had full range of motion of the ankle. He recommended removal of the screw and advised her to continue activities as tolerated. The screw was removed on December 23, 2011. Claimant's final visit with Dr. McCoy was on December 29, 2011. Dr. McCoy removed the sutures and noted "she is doing super." He released claimant and advised her to contact him if she should have any further problems.

On May 1, 2012, Dr. McCoy provided an impairment rating of 10% to the left lower extremity or 14% to the foot pursuant to page 81 of the AMA *Guides*[1] (*Guides*).

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Claimant was seen on June 22, 2012 at her attorney's request by Daniel D. Zimmerman, M.D., who is board certified in internal medicine and certified as an independent medical examiner. Claimant complained of continued pain in her left foot and ankle. Dr. Zimmerman provided restrictions of lifting up to 50 pounds occasionally, up to 25 pounds frequently, avoid frequent flexing of the left foot and ankle, avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activities of the left foot and ankle. Dr. Zimmerman opined that claimant had a 29% impairment to the left lower extremity at the ankle level based upon the *Guides*.

Dr. Zimmerman testified on January 30, 2013, that claimant had normal sensation in both lower extremities. He used strength testing in conjunction with range of motion findings in arriving at claimant's impairment. He acknowledged that strength testing is a subjective test. Dr. Zimmerman testified that his rating was calculated as follows:

> A. The rating was 29 percent of the left lower extremity at the ankle level. It was based on the Fourth Edition AMA Guides to the Evaluation of Permanent Impairment. Range of motion limitations were considered. She had 10 degrees of extension, which is 7 percent from table 42 on page 3/78. Table 43 – her inversion was 0 degrees, which is a 5 percent impairment from table 43. Her eversion was 0 degrees which is a 2 percent impairment from table 43. She had weakness in the left ankle which was rated from table 39 on page 3/77. The weakness I graded a grade forward was 17 percent of the lower extremity. The range of motion limitations were 14 percent of the measurements that I made. The 17 percent was from table 39. Using the combined values chart pages 322 through 324 of the Fourth Edition of the AMA Guides, the impairment rating of 17 percent combined with 14 percent is 29 percent of the lower extremity at the ankle level.[2]

At the regular hearing, claimant testified she had lost strength in her left ankle and had numbness at the surgical site. She was no longer able to flex her foot back and forth, but could move it side to side. She had popping in her left foot when she walked and pain when she bent her toes. Her ankle hurt when she ran and it swelled if she stood on it too long. She regularly took over-the-counter ibuprofen for pain.

Claimant testified there was no employment contract during the summer of 2010. She worked 40 hours every other week unless she was filling in for a coworker. She could turn down hours if she wanted. Katie Petesch, the childcare director and claimant's supervisor, testified that claimant's summer schedule was flexible with no guarantee of hours. She noted the staff works out the schedule amongst themselves and it is based on employees needing time off and the number of children in the program on any given week. As such, claimant was allowed to work in accordance with her own personal schedule as long as there was staff available to cover the childcare program.

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[2] Zimmerman Depo. at 6-7.

Dr. McCoy's deposition was taken on February 22, 2013. Dr. McCoy testified his rating was based on his examination of claimant on December 29, 2011. At that time, claimant's wound was well healed, she had no pain or swelling, she was not taking any pain medication and, while she did not have any subtalar motion because of the fusion, she had full ankle motion. Dr. McCoy testified that a fusion is ankylosed and no muscles move so the impairment for a subtalar joint fusion is "very straightforward." He noted page 81 of the *Guides* states, "The ankylosis impairment in the neutral position is 4 percent for the whole person, 10 percent for the lower extremity and 14 percent for the foot."[3] When questioned regarding whether loss of strength or range of motion would be a factor in claimant's impairment, Dr. McCoy testified:

> Q. Okay. There has been some testimony that an element of weakness is allowed for the AMA Guides for this type of injury, and do you have any opinion on that?
>
> A. Well, I do. Number one, it's impossible to check because she's had a fusion of the subtalar joint. There is no motion so the muscles that move your subtalar joint in and out you can't check for strength because there's no motion to check.[4]

He further testified on cross examination:

> Q. Okay. So basically if somebody has a substantial amount of loss of strength or loss of range of motion versus no loss of strength and no loss of range of motion, you think they fall back to the same exact rating according to the Guides?
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> A. But the strength has nothing to do with it because the muscles don't work any more. Number one, the muscle doesn't work because there's no motion there. It's fused. It's ankylosed. It's solid, so the muscles don't do anything. So you can't even check for strength because there's no motion there. . . .[5]

Dr. McCoy further testified that rating claimant using table 43 was inappropriate because it is for someone who has some motion in their subtalar joint and claimant has none. Additionally, it was his opinion that claimant had no ankle impairment as claimant exhibited full range of motion of her ankle and walked fine during his last examination. He believed checking claimant's range of motion and watching her walk was an appropriate testing method for someone who never had an ankle injury.

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[3] McCoy Depo. at 9; see also p. 21.

[4] *Id*. at 10-11.

[5] *Id*. at 13.

PRINCIPLES OF LAW

K.S.A. 44-510d states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . .

(14) For the loss of a foot, 125 weeks.

(15) For the loss of a lower leg, 190 weeks.

. . .

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

K.S.A. 2010 Supp. 44-511 states in part:

(a)(4) The term “part-time hourly employee” shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or

> employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.
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> . . .
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> (b) The employee's average gross weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be determined as follows:
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> . . .
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> (4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; . . . .
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> (5) If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specific job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection.
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> . . .
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> In making any computations under this paragraph (5), workweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered.

ANALYSIS

The Board adopts Judge Sanders' analysis and conclusions wherein she adopted Dr. McCoy's opinion regarding claimant's permanent impairment of function over that of Dr. Zimmerman. Claimant has a 14% impairment of function involving her left foot.

Regarding claimant's average weekly wage, she was a part-time employee when injured. She asks that the Board only consider her wages from May 25, 2010, forward when calculating her average weekly wage for the work she did after the 2010 school year ended. The Board will not draw a distinction between claimant's work hours during the

school year and her work hours after the 2010 school year ended. In either event, claimant was a part-time employee and her average weekly wage is based on "the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be . . . ." K.S.A. 2010 Supp. 44-511 does not direct the Board to determine claimant's average weekly wage based on what might be different contracts of employment, one that applied during the school year and one that applied after the school year ended.

The Board is slightly modifying Judge Sanders' computation of claimant's average weekly wage. According to respondent's counsel at oral argument, Judge Sanders likely took claimant's 18 weeks of employment listed on the wage statement, but disregarded two of the weeks in which claimant did not work, and divided the total earnings of $1,489.64 by the remaining 16 weeks for an average weekly wage of $93.10.

The Board has only considered calendar weeks prior to the date of accident, and excluded partial weeks, in calculating a claimant's average weekly wage.[6] K.S.A. 2010 Supp. 44-511(b)(5) indicates that money earned during "calendar weeks immediately preceding the date of the accident" is to be considered in determining a claimant's wage.

In determining claimant's average weekly wage, the Board will exclude her first partial week starting February 22, 2010, as well as her last partial week, June 28 to July 1, 2010. The Board also excludes the week listed on the wage statement as ending March 19, 2010, as claimant was essentially on vacation for spring break.[7] This results in the claimant having $1,421.64 in gross earnings over 16 weeks, which results in claimant's average weekly wage being $88.85 and a compensation rate of $59.24.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board modifies Judge Sanders' Award to reflect claimant having a $88.85 average weekly wage, but otherwise affirms her Award.

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[6] *Evans v. A-1 Staffing*, Nos. 1,010,708, 1,010,709, 2007 WL 1390694 (Kan. WCAB Apr. 5, 2007); *Rubalcava v. Hiland Dairy Co.*, No. 231,943, 2000 WL 759345 (Kan. WCAB May 16, 2000); *Reed v. Central Sand Co., Inc.*, No. 216,797, 1999 WL 195262 (Kan. WCAB Mar. 30, 1999); and *Paniagua v. National Beef Packing Co., L.P.*, No. 205,469, 1998 WL 51339 (Kan. WCAB Jan. 27, 1998). All of these cases involved full-time workers, but the analysis whether to only use calendar weeks remains the same.

[7] Petesch Depo., Ex. 1 at 4.

AWARD

WHEREFORE, the Board modifies Administrative Law Judge Rebecca Sanders' March 20, 2013 Award to reflect claimant having an average weekly wage of $88.85, but otherwise affirms the Award.

Claimant is entitled to 17.5 weeks of permanent partial disability compensation at the rate of $59.24 per week, making a total award of $1,036.70 for a 14% loss of use of the foot, all of which is due and payable.

IT IS SO ORDERED.

Dated this _____ day of July, 2013.

_____
BOARD MEMBER

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BOARD MEMBER

_____
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Honorable Rebecca Sanders